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Appellate Docket
No. 629

In the

Supreme Court of the United States

October Term, 1962

ALFRED J. HAUSFELD,
Petitioner,

vs.

ROBERT N. ZIEGLER,
Respondent

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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Under Ohio procedure, a Motion to Dismiss—regardless of when made—is the proper way of raising a constitutional question—state or federal. *Tumey* v. *Ohio*, 273 US 510. In the *Tumey* case the Motion to Dismiss was made at the end of the state's case and the circumstances of the case—repeat—the circumstances of the case raised the federal question. A federal question is raised in one way and in one way only—the circumstances of the case raise the question. *Tumey* v. *Ohio*, 273 US 510 If that were not so—the omission of some caballistic phrase—of some magical word—of some failure to bow three times to the

East and then to kow-tow—would be fatal to the raising of the constitutional question. Cases raise their own questions; they always have and they always will and that has been so well established and it is so well established that "the memory of man runneth not to the contrary."

For practical purposes a Motion to Strike a Petition from the files is the same as a Motion to Dismiss made at the conclusion of a plaintiff's case. Once the Motion to Strike the Petition from the files, or a Motion to Dismiss made at the conclusion of a plaintiff's case is granted, the case is over. And the election of the party against the motion was made and granted to stand on his case and to seek further relief by appellate review is not a failure to exhaust state remedies.

Ohio recognizes the right to bring an Action for Damages for Alienation of Affections. Such an action in Ohio is an action in damages for the commission of a malicious tort. 28 OJ (2nd) sec. 146 at page 271: *Flandermeyer* v. *Cooper*, 85 OS 327.

The judgment in the present case exempts lawyers in Ohio from legal liability for damages for alienation of affections in Ohio divorce cases. No other class of persons in Ohio is so exempt from legal liability in actions for damages for alienation of affections. Unless the Supreme Court of Ohio follows the minority view of *Cohen* v. *Hurley*, 366 US 117, there is no federal constitutional reason in favor of such an exemption for the legal profession. If anything the present authorities are the other way.

Furthermore, in the absence of any opinions, there is no way of knowing whether or not the judgment below rested on an adequate non-federal ground or any ground at all, for that matter. That being so, this Court can examine the record and determine the federal question itself. *Ivanhoe Irrigation District* v. *McCracken*, 357 US 275.

And considering the multitude of divorce suits that are filed in this country, and filed every day, this carte blanche amnesty given by the Supreme Court of Ohio to Ohio lawyers in Ohio divorce cases makes one wonder whether the command of the 14th Amendment—"No state shall deprive any person of * * * property * * * without due process of law" (there is a property right in the affections of a spouse, otherwise there could be no action for damages for alienation of affections of any nature at all consistent with the 14th amendment) has any legal force and effect in Ohio.

The Motion to Dispense with printing the record should be granted; certiorari should be granted; and the case should be sent back to the Court of Common Pleas of Hamilton County, Ohio for trial on the merits.

All of which is respectfully submitted by,

MELVIN EDWARD SCHAENGOLD
Attorney for Petitioner.